

## Property in Human Biomaterials

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## Property in Human Biomaterials: Separating Persons & Things?\*

### Abstract

*The traditional 'no property' approach of the law to human biomaterials has long been punctured by exceptions. Developments in the jurisprudence of property in human tissue in English law and beyond demonstrate that a variety of tissues are capable of being subject to proprietary considerations. Further, amongst commentators there are few who would deny, given biotechnological advances, that such materials can be considered thus. Yet where commentators do admit human biomaterials into the realm of property it is often done with an emphasis on some sort of separation from the person who is the source of those materials. One line of argument suggests that there is a difference between persons and things which constitutes a morally justifiable distinction when it comes to property. This article examines whether the idea of separability can do the work of demarcating those objects that ought to be considered property from those that ought not to be. It argues that, despite the entailment of a separability criterion inherent in both the statutory and common law positions, and the support given to this by some commentators, it is philosophically problematic as the basis for delineating property in human tissue and other biomaterials.*

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### 1. Introduction

A particular line of objection to the body and human biomaterials as property could be captured in the claim that only 'things' can be the proper objects of property, and that the human body and human biomaterials do not qualify for entry into this category of things. This line of reasoning maintains that there is a difference between persons and things (or between things derived from the human body and other types of things) which constitutes a morally justifiable distinction when it comes to property. Such commentators do not think that the owner and owned can be the same and as such deny full self-ownership. For example, Jonathan Herring and P.-L. Chau maintain that:

There may be a logical problem in saying that we own ourselves. That is, there needs to be a clear separation between 'the owner' and 'the owned'. We can only say we own our bodies if we see a clear distinction between 'us' and 'our bodies'.<sup>1</sup>

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\* I would like to thank Sara Fovargue, Jonathan Herring, and Suzanne Ost for their comments on earlier drafts of this article. I would also like to thank the various audiences who have given me invaluable comments on it; these include those at Lancaster and

Where commentators do admit human biomaterials into the realm of property it is often done with an emphasis on some sort of separation from the person who is the source of those materials.<sup>2</sup> Even Margaret Radin, whose property for personhood theory frames certain external objects as being constitutive of personhood, claims that 'property requires the notion of thing, and the notion of thing requires separation from self.'<sup>3</sup> Below we will see that a variety of rationales underpinning the legal position regarding property in human tissue presuppose the idea of separability from persons and would need to go hand in hand with it in order to stand. However, there is, as yet, not a critical body of work addressing the philosophical reasoning and arguments that are entailed in using a separability criterion as capable of delineating property. As such, this article looks at the contention that separability can do the work of delineating those objects that ought to be considered property from those that ought not to be. I argue that, despite the entailment of a separability criterion inherent in both the statutory and common law positions, and the support given to this by some commentators, with regards to human tissue, separability is philosophically problematic as the basis for delineating property from non-property. Although the notion of separation from persons is used to try to exclude the whole embodied person and certain separated body parts from the realm of property, it cannot do the normative work that its proponents would like in this respect.

## 2. Property in human tissue: Becoming a *res*?

The traditional approach of the law to property in human tissue can be summed up by the 'no property' rule; that is, the body is *res nullius* (a thing belonging to no-one). This was originally applied in the context of the deceased body<sup>4</sup> and had become established in English case law by the

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Keele law schools, the Oxford University workshop on Legal Principles Underlying the Law on Storage of Human Tissue, the Centre for Ethics in Medicine at the University of Bristol, the 60th Political Studies Association Annual Conference, and also my colleagues at the University of Manchester.

<sup>1</sup> J Herring, P-L Chau, 'My Body, Your Body, Our Bodies' (2007) 15 *Med Law Rev* 34, 43. Although one could argue that the problem is not even a logical one, but merely one of convention or linguistics.

<sup>2</sup> See, for example, JE Penner, *The Idea of Property in Law* (OUP 1997), 111; JW Harris, *Property and Justice* (OUP 2001), 353; and R Hardcastle, *Law and the Human Body: Property Rights, Ownership, and Control* (Hart 2009), 15.

<sup>3</sup> M Radin, *Reinterpreting Property* (University of Chicago Press: 1993), 41.

<sup>4</sup> See the comments of Sir Edward Coke 'The burial of the Cadaver (that is, caro data vermibus) is *nullis in bonis*, and belongs to Ecclesiastical cognizance.' E Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and other Pleas of the Crown, and Criminal Causes* (London 1669), 203 (3 Co. Inst. 203). See also the Haynes' Case (1614) 77 ER 1389. For a critique of the origins of this rule see JK Mason & GT Laurie 'Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey' *MLR* 64 (2001) 710, 714 and RN Nwabueze, 'Legal paradigms of human tissue' in C Lenk, N Hoppe, K Beier, & C Wiesmann (eds) *Human Tissue Research: A European Perspective on Ethical & Legal Challenges* (OUP 2011), 87.

nineteenth century.<sup>5</sup> However, the rule has long since been punctured by exceptions,<sup>6</sup> with the result that the old legal dictum is becoming ever more redundant. The increasing obsolescence of the no property rule is apparent if we look at the development of the jurisprudence of property in human tissue in England and Wales and beyond. Amongst these are legal determinations of property in biomaterials in order to facilitate prosecutions in theft,<sup>7</sup> to establish legitimate entitlements to possess tissue samples for research and other ends,<sup>8</sup> as a means to permitting remedial action and compensation for damage done,<sup>9</sup> and, most recently, in order to permit possession of sperm for the purposes of *in-vitro* fertilisation.<sup>10</sup> Furthermore, a variety of tissues have been deemed to be subject to proprietary considerations when removed from both deceased and living bodies.

Inherent in the different judicial decisions is the notion of the transformation of human biomaterials from a *res nullius* into a *res* (thing) capable of being governed by property relations. While the predominant rationale employed in the judgements invokes the so-called work and skill exception,<sup>11</sup> there is, as yet, no apparent generalisable account of the types of activities which can trigger the transformation of biomaterials from a *res nullius* to a *res*. One unifying feature, at least until recently, was the fact that the only person who could *not* come to own human biomaterials was their source; that is, the person themselves. However, three contemporary cases (*Jonathan Yearworth and Others v. North Bristol NHS Trust*,<sup>12</sup> *Bazley v Wesley Monash IVF Pty Ltd*,<sup>13</sup> and *Jocelyn Edwards; Re the estate of the late Mark Edwards*<sup>14</sup>) challenge this. They also call into question the work and skill exception, which, in their wake, can no longer be seen as the principal basis for the creation of property rights in human tissue. We will see below that, even though the jurisprudence in this area is still developing and the move away from the work and skill exception is to be welcomed, the various rationales employed are predicated on the problematic

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<sup>5</sup> During this period it was cited in *R v Lynn* (1788) 2 T R 394, *R v Sharpe* (1857) 169 ER 959, *Foster v Dodd* (1866) LQ 1 QB 475, (1867) LR 3 QB 67, *R v Price* (1884) 12 QBD 247, and *Williams v Williams* (1881-85) All ER 840.

<sup>6</sup> See also RN Nwabueze, *Biotechnology and the Challenge of Property* (Ashgate 2007), 44-5. Here Nwabueze indicates that it may have been nineteenth century judicial morality which led to the no property rule gaining the foothold it did, but that prior to that it was possible for a corpse to be considered as property.

<sup>7</sup> See *R v Herbert* (1961) 25 JCL 163, *R v Welsh* (1974) RTR 478, *R v Rothery* [1976] RTR 550, (1976) 63 Cr App R 231, and *R v Kelly and Lindsay* [1998] 3 All ER 741. The first three cases involved living persons and involved the theft of hair, blood, and urine respectively, while the last case involved the appropriation of deceased body parts from the Royal College of Surgeons.

<sup>8</sup> *Doodeward v Spence* 6 CLR 406, *AB & Others v Leeds Teaching Hospital NHS Trust* EWHC 644, *Moore v Regents of the University of California* 51 Cal.3d 120, *Greenberg v Miami Children's Hospital Research Institute* 264 F.Supp2d 1064 (SD Fla, 2003), and *Washington University v William J. Catalona* 490 F.3d 667.

<sup>9</sup> *Jonathan Yearworth and Others v. North Bristol NHS Trust* [2009] EWCA Civ 37.

<sup>10</sup> *Jocelyn Edwards; Re the estate of the late Mark Edwards* [2011] NSWSC 478.

<sup>11</sup> *Doodeward v Spence* 6 CLR 406.

<sup>12</sup> *Yearworth* (n 9).

<sup>13</sup> [2010] QSC 118.

<sup>14</sup> *Edwards* (n 10).

requirement of separation from persons. I first examine some of the relevant decisions and the potential underlying principles governing them, concluding that separability is seen as transforming human tissue into a *res* and facilitating the creation of property rights. Then I move on to elucidate exactly why reliance on such a criterion is problematic.

#### A. Accepting exceptions: Work & skill

In relation to tissue from the deceased the first recent case of note is *R v Kelly and Lindsay*.<sup>15</sup> In this case the defendants had been prosecuted for the theft of body parts from the Royal College of Surgeons. Kelly was an artist and Lindsay a junior technician at the Royal College. At Kelly's request, Lindsay obtained numerous body parts from the College so that they could be cast into moulds for sculptures. These included 'three human heads, part of a brain, six arms or parts of an arm, ten legs or feet, and part of three human torsos'.<sup>16</sup> None of these were returned to the College and some were subsequently found buried in a field near Kelly's family home, some in the attic of his own home, and some in the basement of a friend's flat.<sup>17</sup> The defendants appealed their prosecution, claiming that (1) the body parts could not be considered property for the purposes of the Theft Act 1968 and (2) the Royal College was not in lawful possession of the body parts. Consequent on these, the appellants argued that they could not, therefore, be held to have stolen the body parts from the College.<sup>18</sup> It was of the opinion of the Court, however, that:

... parts of a corpse *are* capable of being property within s.4 of the Theft Act, if they have acquired different attributes *by virtue of the application of skill, such as dissection or preservation techniques*, for exhibition or teaching purposes.<sup>19</sup>

The Court accepted that these particular specimens would have been the subject of 'many hours, sometimes weeks, of skilled work'<sup>20</sup> and had, therefore, acquired different attributes.<sup>21</sup> In coming to this conclusion, the Court relied on the judgement in *Doodeward v Spence*, an Australian case from the turn of the last century.<sup>22</sup> Here it was determined that:

[W]hen a person has by the lawful exercise of work or skills so dealt with a human body or part of a human body in his lawful possession that it has *acquired some attributes differentiating it from a mere corpse awaiting burial*, he acquires a right to retain possession of it, at least as against any person not entitled to have delivered to him for the purpose of burial . . .<sup>23</sup>

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<sup>15</sup> [1999] Q.B. 621.

<sup>16</sup> Ibid 623.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid. 622.

<sup>19</sup> Ibid 631 [My emphasis].

<sup>20</sup> Ibid. 624.

<sup>21</sup> Ibid 621.

<sup>22</sup> 6 CLR 406.

<sup>23</sup> Ibid 414 [My emphasis].

Thus, the action of work or skill on the body (part) is somehow transformative, changing its status and distinguishing it from an ordinary corpse.

In one respect this judgement in *Kelly* would seem to be out of keeping with that of *Dobson v North Tyneside Health Authority*<sup>24</sup> two years previously. Here Gibson LJ held that a brain preserved in paraffin for the purposes of a coroner's investigation had not become property.<sup>25</sup> Yet, in *Dobson* it was also noted that:

There is nothing in the pleading or evidence before us to suggest that the actual preservation of the brain after the post mortem was on a par with stuffing or embalming a corpse or preserving an anatomical or pathological specimen for a scientific collection or with preserving a human freak such as a double-headed foetus that had some value for exhibition purposes.<sup>26</sup>

Rose LJ in *Kelly* took this as an indication that Gibson had in fact accepted the general proposition that the application of work or skill could be transformative in respect of the body and its parts.<sup>27</sup> It is not clear from the judgement in *Dobson*, however, whether the difference was a matter of degree in respect of the work and skill applied (it presumably taking more of each to prepare dissections of body parts than to fix a brain in paraffin) or whether it lies in the intended use that the specimen is to be put to (there being no intention to preserve beyond certain uses within the coroner's jurisdiction in *Dobson*). The ruling in the later case of *AB and Others v Leeds Teaching Hospital NHS Trust*<sup>28</sup> upheld the *Doodeward* exception. In the case the parents of deceased children, whose organs and tissues had been retained without their knowledge following post-mortem, brought an action for psychiatric injury and wrongful interference with the bodies of the deceased children.<sup>29</sup> Here the Court seemed to think that the degree of work and skill applied to organs and tissue samples does have a bearing on the issue with Gage J noting that:

[T]o dissect and fix an organ from a child's body requires work and a great deal of skill . . . The subsequent production of blocks and slides is also a skilful operation requiring work and expertise of trained scientists.<sup>30</sup>

This seems to have been considered as a sufficient condition for rights of possession to have been created regardless of intention regarding future use beyond the direct purposes of the post-mortem examinations: 'the [hospital] pathologists became entitled to possess the organs, the blocks and slides'.<sup>31</sup> What is less clear-cut is whether, in the absence of the same level of work

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<sup>24</sup> [1997] 1 W.L.R. 596.

<sup>25</sup> Ibid 601

<sup>26</sup> *Dobson* (n 24) 601.

<sup>27</sup> *Kelly* (n 15) 631.

<sup>28</sup> (2004) EWHC 644 (QB).

<sup>29</sup> Ibid 12.

<sup>30</sup> Ibid 148.

<sup>31</sup> Ibid 156.

or skill, intention to possess or use the organs, tissue blocks, and slides would be enough to confer such possessory rights.

The work and skill exception also gives rise to other questions which seem to be problematic, philosophically at least. In being an exception to the supposed general 'no property' rule, it would appear to rest on the assumption that the tissue was, prior to work and skill being applied, always unowned.<sup>32</sup> Yet, such a view, as Price notes, has implications for organ donation and research involving human tissue.<sup>33</sup> If a person's organs and tissues do not belong to them, how can they legitimately donate them? An alternative view is that the tissue in question was abandoned, but implicit in the notion of abandonment is that of prior ownership.<sup>34</sup> Furthermore, given the fact that it is notoriously difficult to prove abandonment of goods in English law,<sup>35</sup> it is far from clear *why* we would presume abandonment in these cases. Questions also arise over *how* the application of work and skill brings about the transformation of tissue from *res nullius* to a *res* which is the subject of property rights, what the exact nature of the transformation is, and, indeed, if any transformation at all must take place.<sup>36</sup> Despite all of this, the work and skill exception has since become embedded in statute when it was written into the Human Tissue Act 2004; S. 32(9)(c) exempts 'material which is the subject of property because of the application of human skill' from the provisions of the Act. Nonetheless, while the potential problems with the exception are noteworthy, ultimately they arise *after* the central issue with which I am concerned here. Furthermore, the somewhat questionable character of the work and skill exception has been recognised by the courts and other potentially more solid grounds for the ascription of property rights, as discussed below, are emerging.

### *B. Beyond the work & skill exception: The sperm cases*

It is interesting to note, in *Doodeward*, the comments of Griffiths CJ immediately preceding those regarding the application of work and skill; he says that 'a human body, or a portion of a human body, is capable by law of becoming the subject of property.'<sup>37</sup> He further comments that '[i]t is not necessary to give an exhaustive enumeration of the circumstances under which such a right may be acquired'.<sup>38</sup> Instead he focuses on the grounds upon which he thinks property has been created for the purposes of the case

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<sup>32</sup> See D Dickenson, *Property in the Body* (CUP 2007), 3 and D Price, *Human Tissue in Transplantation and Research* (CUP 2010), 249-250.

<sup>33</sup> Price (n 32) 250.

<sup>34</sup> Ibid 251-252.

<sup>35</sup> See, for example, the illuminating discussion in S Thomas, 'Do Freegans Commit Theft?' (2010) 30 *Legal Studies* 98, 104-114. He argues that, while abandonment is possible in common law, a variety of factors render it difficult to determine if it has occurred; '[t]hese are the value of the goods, the owner's intention, the location of the goods and the finder's intention' (105).

<sup>36</sup> For an excellent discussion of some of these aspects, including how the exception might be interpreted within existing theories of property see Price (n 32) 249-64.

<sup>37</sup> *Doodeward* (n 22) 414.

<sup>38</sup> Ibid.

at hand: which for him is the application of work and skill. This suggests that even though *Doodeward* has been credited with establishing narrow and somewhat dubious circumstances in which human tissue is capable of being property, the decision does *not* actually exclude other grounds for creating property in human tissue. This was also recognised in *Kelly* when Rose LJ noted that 'the common law does not stand still'<sup>39</sup> and that, in the future, human tissue might be deemed to be property even where there has been no application of work or skill '*if they have a use or significance beyond their mere existence.*'<sup>40</sup> These comments seem to have presaged the more recent cases in relation to the jurisprudence of property in human tissue which have gone beyond the work and skill exception.

Three cases are significant in this respect: Jonathan Yearworth and Others v. North Bristol NHS Trust (England and Wales),<sup>41</sup> *Bazley v Wesley Monash IVF Pty Ltd*,<sup>42</sup> and *Jocelyn Edwards; Re the estate of the late Mark Edwards* (both Australia).<sup>43</sup> The relevant tissue in all three cases is sperm, with the first dealing with the common law's approach when stored samples were irrevocably damaged and the latter two with the disposition of stored sperm where the source of the samples had died. In *Yearworth* five men and the administratrix of a sixth brought an action against the North Bristol NHS Trust for damage done to semen.<sup>44</sup> The samples had been stored because the men were to undergo chemotherapy treatment which might have left them infertile. However, the storage system at the Bristol Southmead fertility unit failed and the samples perished. The Court of Appeal adopted a novel approach to dealing with human tissue by ruling that the semen could be considered to be property for the purposes of the claim before the court and, as a result, that the men had grounds for an action in bailment.<sup>45</sup> The case is significant not only in examining the facts through the law of bailment, but also for the basis upon which is found that the sperm was capable of being subject to property rights.<sup>46</sup> While the court admitted that it could have concluded that the sperm was property because there was an application of work and skill involved in freezing the samples in liquid nitrogen, instead it reasoned that:

[W]e are not content to see the common law in this area founded upon the principle in *Doodeward*, which was devised as an exception to a principle, itself of exceptional character, relating to the ownership of a human corpse. Such ancestry does not commend it as a solid foundation.<sup>47</sup>

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<sup>39</sup> *Kelly* (n 15) 631.

<sup>40</sup> *Ibid* [My emphasis]. Specifically, he said '[t]his may be so if, for example, they are intended for use in an organ transplant operation, for the extraction of DNA or, for that matter, as an exhibit in a trial.'

<sup>41</sup> *Yearworth* (n 9).

<sup>42</sup> *Bazley* (n 13).

<sup>43</sup> *Edwards* (n 10).

<sup>44</sup> I use the terms 'sperm' and 'semen' interchangeably, although it should be noted that it is the sperm contained in the semen which is the tissue of relevance.

<sup>45</sup> *Yearworth* (n 9) 47.

<sup>46</sup> See M Quigley, 'Property: The Future of Human Tissue?' (2009) 17 *Med Law Rev* 457.

<sup>47</sup> *Yearworth* (n 9) 45(d).



In conjunction with the fact that the sperm was a product of the men's own bodies, the court took as key the control the men had over their sperm subject to the provisions of the Human Fertilisation and Embryology Act 1990.<sup>48</sup> In so doing, this case sets out a 'broader basis'<sup>49</sup> for the determination of ownership of tissue samples or, at the very least, sperm samples. The position of the court in *Yearworth* was subsequently followed in the two Australian cases.<sup>50</sup> *Bazley v Wesley Monash IVF Pty Ltd*,<sup>51</sup> involved a request by an administratrix that an IVF unit continue to store a sample of her deceased husband's sperm which had been stored prior to him undergoing chemotherapy. The court ruled that the samples could be considered to be the property of the deceased and that a bailment existed. Furthermore, it held that this also applied to his personal representatives.<sup>52</sup> The second case, *Jocelyn Edwards; Re the estate of the late Mark Edwards*,<sup>53</sup> proceeded along similar lines. In this case Mrs Edwards and her husband already had an appointment to discuss IVF treatment, but the day before it was due Mr Edwards had a fatal accident. The application to the court was for a declaration that Mrs Edwards was entitled, as administrator of the deceased's estate, to the possession of sperm which had been extracted in the hospital after his death. The court, relying on *Bazley* and cases from other jurisdictions such as *Yearworth* found that while not binding those rulings were 'collectively, persuasive of the view that the law should recognise the possibility of sperm being regarded as property, in certain circumstances'.<sup>54</sup> The circumstances in *Edwards* were that the sperm has been removed and stored for reproductive treatment. Although Hulme J limited his findings and did not see the need to probe the law in the area for the purposes of the case in front of him,<sup>55</sup> this decision does not rule out other possible circumstances in the future.

### 3. Property & the normative work of separability?

Property can usefully and convincingly be identified as a set of rules governing the relations between persons *with regards to* certain objects<sup>56</sup>

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<sup>48</sup> Ibid 45(f). The 2008 amendments were not yet in force the time of the ruling, but would not have had any substantive effect on the judgement in any case. For more on this see Quigley, (n 46) 462-3 and S Devaney, 'Tissue Providers for Stem Cell Research: The Dispossessed' (2010) 2 *Law, Innovation, and Technology* 165, 184.

<sup>49</sup> *Yearworth* (n 9) 45(e).

<sup>50</sup> For a full analysis of the two Australian cases see L Skene, 'Proprietary interests in human bodily material: *Yearworth*, recent Australian cases on stored semen and their implications' (2012) *Med Law Rev.* Advanced access, doi: 10.1093/medlaw/fws001.

<sup>51</sup> *Bazley* (n 13).

<sup>52</sup> Ibid 33.

<sup>53</sup> *Edwards* (n 10).

<sup>54</sup> Ibid 84.

<sup>55</sup> Ibid.

<sup>56</sup> In positing this view I reject, as a matter of logic, the claim that property relations can obtain *between* persons and things. Such a view could be imputed, for example, from

and, as such, consists of a bundle of jural relations. The view of property as a bundle of (legal) relations is based on what can be termed the Hohfeld-Honoré analysis of property.<sup>57</sup> This means of conceptualising property brings together Wesley Hohfeld's language of rights<sup>58</sup> (claim, privilege/liberty,<sup>59</sup> power, and immunity<sup>60</sup>) and A.M. Honoré's incidents of ownership.<sup>61</sup> These incidents are the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights of transmissibility and absence of term, the prohibition of harmful use, liability to execution,<sup>62</sup> and the incident of residuary.<sup>63</sup> They are thus not limited to claim-rights and/or liberty-rights, but include a variety of other legal relations: liabilities, powers, and immunities. All of these, however, are not strictly necessary for property since those constituents which comprise the core of ownership can be differentiated from any adjunctive rules. These, although part of most property institutions, do not form analytically intrinsic elements of property or ownership interests. According to J.W. Harris:

Privileges and powers are intrinsic elements of ownership interests. Claim-rights, duties, liabilities, and immunities are important concomitants of ownership interests but are not analytically intrinsic to ownership interests in resources (material or ideational).<sup>64</sup>

Thus, Harris' conception jettisons the claim-rights, immunities, and liabilities that are contained within Honoré's schema of ownership. These

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Harris who argued that ownership interests 'involve a juridical relationship between a person (or group) and a resource' (Harris (n 2), 5). However, since objects or things cannot be the bearers of the rights, or indeed correlative duties, that complex property relations involve, it does not make sense to conceive of them as anything other than person-person relations. In this manner, persons can be said to stand in relation to things, but this is not the same as claiming that those relations obtain *between* persons and things. See J Waldron, *The Right to Private Property* (Clarendon Press: Oxford, 1988) 27.

<sup>57</sup> WN Hohfeld, *Fundamental Legal Conceptions of a Right as Applied in Judicial Reasoning* (Yale University Press 1919, reprinted 1966) and AM Honoré, 'Ownership' in AG Guest (ed) *Oxford Essays in Jurisprudence* (OUP 1961). See also Waldron (n 55) 47-53, SR Munzer, *A Theory of Property* (CUP 1990) 17-27, and LC Becker, *Property Rights: Philosophic Foundations* (Routledge & Keegan Paul 1980) ch. 2.

<sup>58</sup> Hohfeld (n 56).

<sup>59</sup> Note that many commentators use the term 'liberty' in place of the Hohfeldian 'privilege'. Here I use the terms interchangeably. Additionally, we should note that Hohfeld thought that only claim-rights are rights 'in the strictest sense' (Ibid 36).

<sup>60</sup> For a good explanation of the Hohfeldian analytical system see L Wenar, 'Rights' in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2010 Edition). The four positions, as set out by Wenar, are: (1) A has a claim that B  $\phi$  if and only if B has a duty to A to  $\phi$ , (2) A has a privilege to  $\phi$  if and only if A has no duty not to  $\phi$ , (3) A has a power if and only if A has the ability within a set of rules to alter her own or another's Hohfeldian incidents, and (4) B has an immunity if and only if A lacks the ability within a set of rules to alter B's Hohfeldian incidents (see sections 2.1.1-2.1.4).

<sup>61</sup> Honoré (n 56).

<sup>62</sup> This is the liability that owners have for their debts with respect to their property.

<sup>63</sup> This incident recognises that property rights can expire or be abandoned and that when they do they can become vested in other parties.

<sup>64</sup> Harris (n 2) 128. Note that 'privilege' is Hohfeld's preferred term (n 56), whereas many commentators use the word 'liberty'. Here I use the terms interchangeably.

concomitants of ownership comprise those rules which, although generally found in property systems, are not constitutive of ownership itself. Since Honoré was trying to capture the general nature of property systems and the functioning of property institutions, his account includes elements which are ordinarily associated with ownership, but are not inherent to it.<sup>65</sup> Regarded in this manner, the *locus* of property and ownership lies in rights of use and control (use-privileges and control-powers);<sup>66</sup> it recognises and protects a particular way of controlling certain resources. Those who support the notion of property in the body believe that individuals ought to have this type of control over their bodies or, at least, over their separated biomaterials. As Jesse Wall notes:

[T]he ability of a person to possess, use, manage and alienate objects—to have some control of the world around them—is fundamental to a person's preference satisfaction, their autonomous life or the expression of their personhood. This is particularly the case when the object is (or was) as personal as a part of their body.<sup>67</sup>

In this respect, there are parallels to be drawn between the type of control that we can be said to have over our property and the exclusive use that individuals have in determining what is done with, or indeed to, their bodies.<sup>68</sup>

Despite the obvious parallels regarding use and control, it has been argued that in order for something to be considered as being property it must be *outwith* the person. There must be normative boundary which separates persons from the rest of the world. Margaret Radin talks of a 'perceptible boundary',<sup>69</sup> while Harris claims that there must be a 'necessary distancing between human source and owned object'.<sup>70</sup> Similarly, Rohan Hardcastle maintains that 'it is clear that for a thing to be the subject of property rights it must be distanced from human subjects'.<sup>71</sup> Various criteria have been suggested as appropriate for making the delineation between property and non-property; for example, transferability,<sup>72</sup> detachment,<sup>73</sup> distancing,<sup>74</sup> and separability.<sup>75</sup> Thus, in setting such a criterion, only objects which can meet it can be permitted into the realm of property. In the case of body parts and human biomaterials, meeting the criterion is seen as bringing about a transformation from person to thing, thereby changing the status of these from non-property to property (or at least into objects capable of being subject to property rights). Yet, the question of detachment, distancing, or separability from persons only

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<sup>65</sup> Harris (n 2) 128.

<sup>66</sup> Ibid 5.

<sup>67</sup> J Wall, 'The Legal Status of Body Parts: A Framework' (2011) 31 OJLS 783, 793.

<sup>68</sup> Penner (n 2) 121.

<sup>69</sup> Radin (n 3) 41.

<sup>70</sup> Harris (n 2) 353.

<sup>71</sup> Hardcastle (n 2) 15. Footnote omitted.

<sup>72</sup> Munzer (n 56) 47.

<sup>73</sup> Hardcastle (n 2) 127-8.

<sup>74</sup> Harris (n 2) 332 and Hardcastle (n 2) 15.

<sup>75</sup> Penner (n 2) 105-127.

becomes an issue when thinking about things such as human biomaterials. It is not something that we need to consider when subjecting other items, like houses and cars, to a property analysis.

It is clear from my brief examination of the development of the jurisprudence regarding property and the body that the body and its parts have been, and continue to be, treated as property for a variety of legal purposes.<sup>76</sup> The rationales underpinning the various decisions are predicated on the notion that the human body and biomaterials must undergo some sort of transformation in order to become a *res* (thing). In becoming a *res* their character is seemingly altered in a legally (and perhaps morally) significant manner, rendering them the subject of property(-type) rights of use and control. In the earlier cases (*Doodeward*, *Kelly*, and *AB v Leeds*) this transformation could be seen as relying on the work/skill exception and, therefore, as being an especially tangible conversion. Yet the later sperm cases, in not relying on the exception, indicate that there is *something else* doing important normative work. Whatever the contextualised set of circumstances or conditions required for the creation and acquisition of property rights in human tissue, all presuppose the separability of these materials from persons. Hardcastle notes a distinction is to be made between things that are actually subject to property rights and those which are merely capable of being subject to them.<sup>77</sup> In this vein, separability functions as a bright line which must be crossed as a prerequisite for the transformation to *res* to take place. Even though something else needs to occur to actually create those property rights, crossing the normative line seems to render human tissue capable of being governed by property considerations. Judicial support for this can be found in *Yearworth* when the Court maintained that 'a living human body is incapable of being owned.'<sup>78</sup> Further to this, the decision in *R v Bentham*<sup>79</sup> was cited to demonstrate that 'a person does not even 'possess' his body or any part of it'.<sup>80</sup> Of specific relevance in *Bentham* are Lord Bingham's comments that:

One cannot possess something which is not separate and distinct from oneself. An unsevered hand or finger is part of oneself. Therefore, one cannot possess it . . . What is possessed must under definition be a thing. A person's hand or fingers are not a thing.<sup>81</sup>

As such, some sort of a separation or separability criterion appears to be in operation by the courts and seems to be pivotal in deciding whether

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<sup>76</sup> See section 2.

<sup>77</sup> Hardcastle (n 2) 128.

<sup>78</sup> *Yearworth* (n 9) 30.

<sup>79</sup> [2005] UKHL 18; [2005] 1 WLR 1057.

<sup>80</sup> *Yearworth* (n 9) 30.

<sup>81</sup> *Bentham* (n 77) 8. One response to this one might be to point out that in everyday language people do in fact refer to their hands, fingers, and other body parts as 'things'. However, this is not the general sense utilised by those who employ separability; instead they are referring to some kind of normative distinction between persons as subjects and things as objects.

something is even capable of being the appropriate subject of property rights.

James Penner offers as a defining feature of the objects of property a separability thesis. He says that:

Only those 'things' in the world which are contingently associated with any particular owner may be the objects of property; as a function of the nature of this contingency, in theory nothing of normative consequence beyond the fact that the ownership has changed occurs when an object is alienated to another.<sup>82</sup>

He also refers to this as the thinghood of objects of property.<sup>83</sup> His claim is that an object of property must be 'separate and distinct from any person who might hold it'.<sup>84</sup> The contingency claim is a way of saying that the object lacks some sort of relevant connection with the person and it '*might just as well be someone else's*'.<sup>85</sup> that 'there is nothing special about *my* ownership of a particular [item]'.<sup>86</sup> He identifies two senses of separability; one centres on the identity of owner and the other on the owned thing itself.<sup>87</sup> The first sense sees separability as involving the termination of an individual's relationship with their property. When this happens the (former) owner does not undergo or experience any substantive changes in identity or personality as a result of this. The second sense of separability has its focus in the alienation of the thing *to* another where the person who acquires the object, and the corresponding property rights, has fundamentally the same relationship to the thing.<sup>88</sup> These senses correspond to two questions that can be asked in order to examine how separability can identify property: (1) 'is the owner still the same person if he no longer has this thing because it is taken away from him or destroyed?'<sup>89</sup> and (2) 'does a different person who takes on the relationship to the thing stand in essentially the same position as the first person?'<sup>90</sup> It is the second question that Penner believes is pertinent. He dismisses the first because he thinks it does not help to distinguish property relations from other types of relations; whereas the second question can help in identifying property relations, particularly in hard cases. The body is just one of these hard cases and Penner contends that analysing it within the framework posed by the second question helps to illuminate matters. As such, the rest of this paper will be devoted to probing the hard case of the body and asking whether some notion of separability (and indeed contingency) can do the normative work that its proponents claim it does.

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<sup>82</sup> Penner (n 2) 112.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid 113.

<sup>85</sup> Ibid 112 [Emphasis in original].

<sup>86</sup> Ibid.

<sup>87</sup> Ibid

<sup>88</sup> Ibid 114.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

#### 4. Separability, persons, & the body

Asking the (purportedly) relevant question with regards to the contingency of a person's relationship to their body prompts the question of whether another person could stand in relation to one's body, or part thereof, in the same way as the first person. With respect to the whole person, Penner thinks that the body is not property. He contends that:

[T]he relationship of property dictates the absolute control of the owner over the thing . . . and the corresponding absence of any 'control' of the thing over the owner. This entails that the owner can rid himself of a thing that he holds as property. This is not the case with our bodies. We are stuck in, or to, but certainly, with them.<sup>91</sup>

Hence, for Penner, the whole living body, the embodied person, ought not to be considered as property since we are 'stuck with them'. We cannot separate ourselves from our lives and personalities and, thus, we cannot own ourselves or our bodies. Since being in a property relationship entails that someone else might just as well have owned the thing in question, it makes no sense to talk of owning our bodies.<sup>92</sup> Still it is not correct to claim that we cannot separate ourselves from our lives and personalities or that we are stuck with our bodies; death would seem to be the prime candidate for an event which puts distance between the person and their body.<sup>93</sup> It severs the relevant connection that (former) persons have with their bodies as a whole. Since the pre-mortem person has already been extinguished, the corpse can be seen as already disconnected from any person or personality. Penner even says as much himself:

[A] corpse has no *necessary* attachment to any living human. So it can be as much the subject of a property right as anything else.<sup>94</sup>

Despite this, we treat the corpse as if it were 'still attached to a self' and our treatment of the dead is affected by the person that used to exist.<sup>95</sup> Be that as it may, while we might act in a manner that is respectful towards the deceased, this does not mean that the corpse is still attached to a self in any substantive sense. As Price observes:

[S]ymbolic power and difficulties of psychological reorientation cannot preserve 'self' even if the person's identity lives, for others, *in their minds* after physical death has ensued.<sup>96</sup>

One might respond to this by arguing that persons do in fact have a variety of interests which persist beyond death anchoring the deceased body to the

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<sup>91</sup> Ibid.

<sup>92</sup> Ibid 124.

<sup>93</sup> Price (n 32) 241-2.

<sup>94</sup> Penner (n 2) 122 [my emphasis].

<sup>95</sup> Ibid.

<sup>96</sup> Price (n 32) 242-3.

former person.<sup>97</sup> The existence of such posthumous interests is philosophically contentious;<sup>98</sup> however, *even if* we accept that a person's interests survive beyond their death this does not have a bearing on the issue of separability and property. If interests do endure beyond the grave then the relevant consideration in this respect is whether they may be wrongfully damaged.<sup>99</sup> Joel Feinberg describes posthumous harm as 'the objective blocking of goals and thwarting of desires'.<sup>100</sup> Thus, harm might occur where the body of the deceased (or parts thereof) is used in a manner incompatible with the interests of the ante-mortem person. Even so, recognising that the deceased body becomes, or is capable of being, property need not be harmful to the interests of the deceased. Potential posthumous harms to interests have something to do with the property question only insofar as they might be relevant to property writ large; we might just as easily thwart these interests through the disposal of the deceased's house as through the disposition of their body. As such, nothing in the idea surviving interests speaks against a person's relationship to their body being contingent in the sense required for the separability thesis.

Moreover, it is not obvious that asking the purportedly relevant question of whether third parties, who take on a relationship to the deceased body, stand in the same position as the former person advances the situation. If this is a metaphysical question about whether they can come to inhabit the deceased's body and utilise it as they did, the answer is patently no. In any case this is an unlikely interpretation of the requirement; therefore, if it is a question about whether others can come to acquire the use and control rights that formerly inhered in the deceased, the answer might be different. There is nothing, literally or conceptually, that makes it impossible for these rights to transfer to others upon death. The separability thesis in itself gives us no reason to reject property in the deceased body. Thus, if we want to deny property in the deceased body we need to find a different justification.

The separability criterion also needs to be questioned in relation to parts of the living body, such as organs, tissues, and cells. Biomedical advances and technology has made possible their separation from the whole. This separation puts literal distance between the person and their (former) body part, making the association between them merely a conditional one. This element of conditionality or contingency is required on Penner's account of property (in the body). He thus suggests that body

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<sup>97</sup> See J Feinberg, 'Harm and Self-Interest' in PMS Hacker & J Raz (eds), *Law, Morality and Society: Essays in Honor of H. L. A. Hart* (Clarendon Press 1977), 'The Rights of Animals and Unborn Generations' in J Feinberg (ed), *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton: Princeton University Press 1980), and *Harm to Others* (OUP 1984) ch 2.

<sup>98</sup> See, for example, E Partridge, 'Posthumous Interests and Posthumous Harms' (1981) 91 *Ethics* 243; JC Callahan, 'On Harming the Dead' (1987) 97 *Ethics* 341; and JS Taylor, 'The Myth of Posthumous Harm' (2005) 42 *Am Phil Q* 311.

<sup>99</sup> Feinberg, *Harm to Others* 83-91.

<sup>100</sup> *Ibid* 85.

parts can be conceived of as property *so long as* the removal of particular parts does not essentially alter the person:

If . . . science proves capable of disconnecting an organ so that one remains essentially the same person, as is the case with a kidney, we can regard such an organ as a contingent material possession, and therefore one's property.<sup>101</sup>

This analysis presents at least two problems. First, it is difficult to see what claim is being made here. Is it a moral claim about personal identity? If so the implication would be that it is not permissible to remove organs, tissues, or body parts where to do so would fundamentally change the person. If such a claim is to stand then the portion of it doing the normative work is the latter part. If this is correct, the wider assertion must be that it is wrong not just to remove body parts, but to do anything which would fundamentally alter one as a person. As we will see below, we do not need to delve into any particular theory of persons or personal identity to see that this is problematic. Secondly, it is not obvious whether the claim being made is a literal or a conceptual claim about separability; does separability entail *actual separation* from the person or that objects *be merely separable*? Each interpretation raises its own problems.

#### A. *Separate or separable?*

One interpretation of the separability thesis would be to take separability as meaning an organ or piece of tissue which is *capable* of being separated from the whole person. Provided a particular part of the body is capable of being removed then it can be considered as property. For example, small tissue samples which are taken for biopsy would be property; even whole organs, such as a kidney, a lobe of a liver, a lung. In addition, other parts such as fingers and toes or even whole limbs could be considered thus. Actual removal on this view would not be necessary, just the technological possibility. However, one might point out that almost every organ, tissue, and cell in the human body is, thanks to modern surgery, capable of being removed. For this reason, this interpretation is likely to be too expansive for those who do not want to admit property in whole organs or *in situ* tissues, since it might actually permit property in the whole body. Penner refers to separability as a conceptual criterion<sup>102</sup> which suggests this interpretation, but at the same time tempers his argument with more pragmatic leaning claims, saying:

I would be the same person if I lost one of my limbs, or if my relationship to a friend was severed because that friend died, but my relationship to my limbs and my friends are not property relationships.<sup>103</sup>

Therefore, it might be that the particular body part in question needs to be not merely *separable*, but that it must be actually *separated* from the body.

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<sup>101</sup> Penner (n 2) 122.

<sup>102</sup> Ibid 122.

<sup>103</sup> Ibid 114.



This version of the criterion seems to be at work in both the relevant case law and the comments of other theorists. Lord Bingham in *R v Bentham* stated that objects under property consideration must be 'separate and distinct from oneself.'<sup>104</sup> Furthermore, Harris and Hardcastle argue for a 'distancing' between the subjects and objects of property rights.<sup>105</sup> Harris rejects the notion of ownership or property in the whole body and claims that when self-ownership is invoked it is the clearest example of the distancing requirement being overlooked.<sup>106</sup> However, he contends that persons should be thought of as owning their separated body parts<sup>107</sup> and that there is 'no conceptual difficulty'<sup>108</sup> in them being conceived of as property, because once separation has taken place there is the 'necessary distancing between human source and owned object'.<sup>109</sup> Harris does not elaborate on the 'distancing' aspect of his claim save that it must be something that a person 'could be seen to control or use as 'owner''.<sup>110</sup> Nevertheless it does not advance the situation if those things which are considered to be subject to property rights are described in this manner. Clearly an individual *could* be seen as owner with respect to something which is *capable* of being owned, but we first need a way of identifying such items. To define the objects in relation to the owner presupposes that the thing can in fact be owned, but determining what can be owned is meant to be the *purpose* of the criterion.

In order to think about separability (or distancing) as *actual* separation, consider the following: Jane is in end stage renal failure and urgently requires a kidney transplant. As chance would have it, Jane's husband Peter is willing to donate one of his kidneys and is also a good match. Jane and Peter attend the transplant unit at the local hospital where successful retrieval and transplant operations take place. If the separability thesis is to be interpreted in terms of 'separate', the implication is that prior to Peter going into hospital and even as he lies anaesthetised, but still intact, on the operating table, the kidney is not property (Peter's or anyone else's). Yet, once the kidney is physically removed from his body by the transplant surgeon and is lying in a sterile dish beside him, it is property. After that, once the kidney is taken to the adjoining operating theatre and becomes part and parcel of Jane's body, no longer being separate from a person, it is again no longer capable of being governed by property relations. Such a situation raises interesting challenges.

First, and foremost, it prompts us to ask *whose* property the kidney is while it is detached from Peter. The answer we might want to give is that it is Peter's property. This would be Harris' answer since he says 'if some part of a body becomes separated, by surgery or otherwise, its human

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<sup>104</sup> *Bentham* (n 77) 8.

<sup>105</sup> Harris (n 2) 353 and Hardcastle (n 2) 15.

<sup>106</sup> Harris (n 2) 333.

<sup>107</sup> *Ibid* 351.

<sup>108</sup> *Ibid* 353.

<sup>109</sup> *Ibid*.

<sup>110</sup> *Ibid* 332.

source ought to be recognized as its owner.'<sup>111</sup> But if this is correct, *what* generated Peter's claim to the kidney? His claim could stem from the fact that the kidney resided in his body only moments previously; however, we also need to think about the property rights that have now been created where no such rights existed before. How would these rights, seemingly created *ex nihilo*, be different to the rights of control that Peter had just moments previously? There is a significant difference in the kinds of things that Peter can do with his kidney once it resides outside his body, but this is not the same as showing that his right to control its use has somehow changed. If the rights do not change significantly upon the removal of the kidney (nor, barring their transfer, when they are transplanted into Jane), it is not obvious why one bundle of rights ought to be conceived of as property, while the self-same bundle of rights is deemed not to be property merely as a function of the physical position of the kidney. It seems odd to say that we should call them one thing *in vivo* and another *ex vivo*. While mere oddness is not enough to show that the bundles of rights could not be considered differently, in the interests of coherency and consistency, it does, at least, cast doubt on the cogency of considering them thus.<sup>112</sup>

#### *B. Separability & the alteration of persons*

Whether the separability thesis entails actual separation or that parts be merely separable, the scope of the requirement seems to be quite wide. As I noted in relation to the deceased body, there is nothing literally or conceptually which would prevent another person taking on the same rights-relationship to organs and tissues which formerly attached to another. This is also the case for organs and tissues from the living body. Given this, in order to construct a normative boundary which narrows down the scope of property in the body an additional criterion must be added. According to Penner, property in body parts can be permitted as long as a person remains essentially the same after the removal of the part.<sup>113</sup> Although, it is not clear what this addendum *a propos* persons remaining essentially the same ought to be taken to mean, I interpret it as meaning something like the

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<sup>111</sup> Ibid 352-3.

<sup>112</sup> One might point out that labels in laws have functions other than to make logical distinctions, this might be a policy matter based on a particular set of concerns, for example, ones regarding commodification of the body (thank you to Jonathan Herring for raising this point). It is, however, not obvious that such concerns give us reason to refuse to recognise any and all property rights in the body (or body parts) rather than simply putting in place justified restrictions on those rights. A further response might be that the interests that rights pertain to are similar in the sense that they protect use and control whether or not the body parts are attached or not. However, what is being recognised when we label them differently is that a different legal mechanism is needed to protect them (thank you to one of the anonymous reviewers for this point). This might well be correct, but it is not a principled objection to property in the body *per se*, rather it is a pragmatic point about the mechanism of redress for various wrongs which are available within the purview of the law. This is important because, as we already saw in relation to *Yearworth*, biotechnological advances will continue to prompt us to challenge which mechanisms and modes of redress are most appropriate.

<sup>113</sup> Penner (n 2) 122.

requirement that there be no significant alteration of oneself as a person. On this basis it is possible to distinguish between two states which might count as a significant alteration to the self *qua* person. The first would be substantial changes to constitutive parts of our personality, such as our desires, preferences, and emotional states: the *personality-affecting* version of the separability thesis. The second is any change that would completely deprive us of our status as persons, such as a severe injury that left us in a condition where we could no longer exercise any of the components that make up our personhood, for example, being in a permanent vegetative state: the *personhood-affecting* version. It cannot reasonably be the first of these that is entailed by Penner's claim because, if the assertion is correct, it must encompass a wider claim than simply one regarding the removal of body parts. While the loss of body parts can have a major impact on an individual's personal identity (perhaps closely related to their view of themselves), life events such as growing up, passing through the education system, and having children also have key roles to play in one's development as a person. If the argument is to be taken as a treatise against fundamental change in this respect, we would be committed to the view that these significant life events which alter persons must not be allowed to take place. Even if the concept of change being employed is change for the worse, such a claim would make no sense.

Another mistake inherent in a personality-affecting version of the separability thesis is the assumption that only things removed from the body can have such a dramatic effect on how a person's life develops and on their functioning as a whole person. In order to see why this is the case let us think about Fred. His house has been repossessed and he has no money for other shelter or food. He is left homeless and has to sleep outside in the harsh winter without any food to sustain him. Eventually Fred dies from exposure and hunger. In such circumstances the house and food are as integral to Fred's well-being and ultimate survival as are any of his organs and tissues. The effect of the removal from Fred of the house and the food to feed himself could 'count as an attack on his personality, on himself, not as an attack on part of his worldly goods.'<sup>114</sup> Should we, therefore, conceive of the house and food as incapable of being property in such cases? It is correct that all tokens in kind need not be considered the same,<sup>115</sup> yet to hold that in this case would seem to needlessly overcomplicate the matter. If, as those such as Harris argue,<sup>116</sup> the locus of property and ownership lies in rights of use and control, then the house and the food in this example will be the objects of someone's property rights; the pertinent question is simply *whose*. If those property rights are not Fred's, we might still want to stop the expropriation of the house and somehow ensure that Fred has adequate food to survive. The mere fact of property is not enough on its own to determine the moral right or wrong of the situation. This is not to argue that the property element is irrelevant: it is still a normatively important factor, but it has to be considered with other morally relevant facts. It might be, for

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<sup>114</sup> Ibid 122.

<sup>115</sup> Thank you to Søren Holm for this point.

<sup>116</sup> See section 3 above.

example, that the third parties who must forego on the house and food in order to prevent Fred's death ought to be compensated for their loss in respect of these things. While we might think that property is important there are likely justifiable moral limits to the rights it entails.

What then of the personhood-affecting version of the separability thesis: the claim that the kind of alteration which is relevant is one which extinguishes one's personhood in its entirety? This interpretation is more plausible and Penner seems to link his argument to one regarding the removal of organs which would cause death. He contends that those organs that cause death upon their removal cannot be considered to be property;<sup>117</sup> the underlying supposition, presumably, being one about the undesirability of death in general (or perhaps by organ removal more specifically). Thus, the contention appears to be that if the organ cannot be separated from the person and leave one's capacity for personhood intact, it cannot be property. The slightly extended claim might be something along the lines of it being, in general, a bad thing to permanently extinguish an individual's personhood. If conceding property in the body permits individuals to do things which extinguish their personhood then we must not concede property. Take the example of the heart, the removal of which would ordinarily kill a person. Regarding the heart, the argument would be that if we concede that an individual's heart is their property this commits us to allowing them to do what they wish with it, including arranging for its removal. However, whether or not such activities are permissible is not wholly dependent on whether vital organs are to be considered as property. For instance, we could conceive of different motivating factors which might impact on our moral assessment of such an act. Imagine three different scenarios: person A wants to donate his heart and lungs to his child with cystic fibrosis, person B owes a debt to a third party where the third party can reclaim what is owed through the sale of the heart, and person C simply wishes to commit suicide and wants to do this through having a vital organ removed so that it can be donated after his death.<sup>118</sup> Each of these scenarios has different factors at play which would take a part in our moral deliberations as to the permissibility of the removal of the heart. Such activities are subject to other moral reasoning. It would not be the mere fact of property that would determine the moral permissibility in each case. The removal of the heart in these examples may be subject to property-independent prohibitions.<sup>119</sup> The oft-cited example which illustrates this is the knife: even though one's knife is property, there are prohibitions (moral and legal) on using it to harm others. But for the wrong of harming others, I could use my knife to inflict injury.<sup>120</sup> Justified restrictions on use, however,

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<sup>117</sup> Penner (n 2) 122.

<sup>118</sup> This is part of the premise in the Will Smith film *Seven Pounds* where the protagonist commits suicide in a way that ensures his organs will be donated following his death. See also D Wilkinson & J Savulescu, 'Should we allow organ donation euthanasia: Alternatives for maximising the number and quality of organs for transplantation' (2012) 26 *Bioethics* 32.

<sup>119</sup> Harris (n 2) 40-1.

<sup>120</sup> See R Nozick, *Anarchy, State, and Utopia* (Basil Blackwell 1974) 171: 'My property rights in my knife allow me to leave it where I will, but not in your chest.'

do not rest on whether the thing in question is an individual's property or not. In the scenarios above, this means that *even if* the heart is deemed to be property, it does not necessarily give the owner free reign to do what he likes with it. We might find that, despite allowing that the heart is a particular person's property, the harm of its removal (death) outweighs other considerations.

As well as questioning the seeming underlying assumption that, in the case of the body, property would operate as the trumping justification in deciding questions of moral permissibility, we can also query another aspect of the reasoning employed. In only permitting property in bodily parts and tissues, the removal of which leaves 'essentially the same person',<sup>121</sup> Penner is relying on the sense of separability which he has previously rejected. He claims, to distinguish property, the pertinent question is *not* whether the person is still the same person once they no longer have the thing under debate; instead, the focus ought to be on the question of whether other individuals who take on the relationship to the thing 'essentially stand in the same position to it as the first person.'<sup>122</sup> Perhaps his presumption is that the answer is self-evident; when it comes to the whole body and vital organs others simply do not stand in the same position to them. However, such a claim depends on what is meant by another person having the same relationship to the thing. There are at least two possible interpretations of what is meant here. I touched upon these earlier when discussing the deceased body. The first might be that the object fulfils the same function for person B as it did for person A. The second might be that person B stands in the same position because all the rights, duties, powers, liabilities, and immunities, originally held by person A regarding the thing, have now been transferred to person B. Consider again Peter and Jane's kidney donation and transplant. Even though the kidney transplanted from Peter is immunogenetically different from the rest of Jane's body, it does, with the help of immunosuppressant medication, fulfil the same function as it did in Peter's body. Jane would also have basically the same relationship to the kidney in the second sense since she would have acquired the same rights of use and control over the kidney as Peter had prior to the transplant.<sup>123</sup> This would also be the case if it was a heart and not a kidney that had been transplanted and it is, therefore, not obvious that in the case of body parts and tissues the requirement for others to have the same relationship to the thing is useful. In order to reject the notion of vital organs as property, Penner *has* to fall back on the interpretation of separability which he previously rejected; that there must be no significant alteration in the person. I have already shown how this is problematic.

Even if we accept the addendum that provided a part can be removed and does not fundamentally alter the person it can be property, this would

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<sup>121</sup> Penner (n 2) 122.

<sup>122</sup> Ibid 114.

<sup>123</sup> You could, however, imagine a scenario where they did not quite have all of these if certain conditions had been placed on the transplant such as a stipulation that they look after the kidney appropriately.

still admit many bodily parts and tissues into the realm of property. Such a restriction does not give us a way to easily identify *which* body parts are capable of being property. Take, for example, Peter's left kidney, under either interpretation of the separability thesis it qualifies as property. It is separable and its removal would not of itself cause Peter's death or any essential change to him as a person. What if it was actually removed; how would this affect the property status of his *other* kidney? It would still be separable and its removal would not cause his death, at least not straight away, and perhaps not for a long time if he is placed on dialysis. Neither could it really be said to essentially alter him as a person; yet there is a significant negative impact on his biological functioning. Is it then the case that only one of his kidneys is his property? This seems implausible. To answer in the positive would be to claim that the property status of organs and tissues is a function of any that have already been removed. This would give neither analytical nor practical clarity.

## 5. Creating property: Intention & creation-without-wrong

One response to my argument against the supposed normative force of separability would be to claim that it is not just separability which is important, but this in conjunction with the *intention* to use a body part, organ, or tissue as property. This is a plausible reading of *Yearworth*<sup>124</sup> and is Hardcastle's approach. He sees separation (detachment) as the legal prerequisite for the creation of property rights; it renders body parts *capable* of being subject to property rights, but more is needed to create and allocate those rights.<sup>125</sup> Penner also appeals to intention to explain why body parts are not *generally* considered as property. He maintains that, even in the case of a separable organ such as the kidney, if it is not a person's *intention* that the kidney be treated as property then it will not be considered as such. He uses the example of a person being stabbed in the kidney where that person had intended to sell their kidney. Their kidneys are not conceived of as property '*unless* one is actually considering selling them or giving them away or otherwise getting rid of them.'<sup>126</sup> We are thus back to the suggestion that actual separation is not necessary just the mere technological possibility of detachment. Yet, if it is the intention of the person in which the particular body part resides that is determinative it is hard to see what work separability or detachment does normatively-speaking. Nevertheless, Hardcastle's 'detachment plus intention' criterion is worthy of exploration.

He maintains that '[f]or property rights to be created under this principle it is necessary for a person to form and express an intention to use separated biological materials as property.'<sup>127</sup> Ordinarily the consent of the source of the materials would constitute evidence of sufficient intent in this

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<sup>124</sup> *Yearworth* (n 9). Thank you to Jonathan Herring for this point.

<sup>125</sup> Hardcastle (n 2) 145-155.

<sup>126</sup> Penner (n 2) 121.

<sup>127</sup> Hardcastle (n 2) 151.

respect because, upon removal of the materials in question, they would 'usually be aware . . . [that they] will be used as property for various purposes.'<sup>128</sup> However, this is precisely what is at issue for those who advocate the initial (and automatic) allocation of property rights to the source. Up until recently, as far as the law pertaining to human materials was concerned, the one person deemed not to have property in separated tissues was the source of those materials. In England and Wales, most human tissue and biomaterials are governed by the provisions of the Human Tissue Act 2004.<sup>129</sup> It is the consent provisions of this Act which purportedly protect individuals with regards to their tissues, but these provisions do not offer adequate protection of an individual's interests in their bodily parts and tissues in a biotechnological age. The Act offers more protection for the deceased than the living because biomaterials from the living are exempt from Part 2 of Schedule 1 of the Act, meaning they can be used for clinical audit, education and training, performance assessment, public health monitoring, and quality assurance without the consent of the source.<sup>130</sup> Where consent is not even needed it is unlikely that the source would be aware of the potential uses of their tissues in order to form the intention that they be considered as property. However, it could be argued that such uses are not those relevant to considerations of tissue as property, but the Act also contains a further more problematic exemption which applies to tissue removed from the living and deceased. Materials created outside the body do not count as 'relevant materials' for the purposes of the Act;<sup>131</sup> thus, any cell lines created are not covered by the Act. This is remarkable on two counts; first, because of the considerable potential commercial value of cell lines and, secondly, because such cell lines are often indistinguishable from the donor tissue from which they were created.<sup>132</sup> Again, exemption from consent provisions means that individuals are unlikely to be aware of this use for their tissues; consequently, if the intention requirement entails 'conscious' or 'deliberate' intent to create property then it will falter before it even gets going.

Hardcastle recognises that there are difficulties with including intention as part of a normatively relevant criterion for creating and allocating property rights and considers those cases where (1) materials have been separated without consent and third parties form an intention to use as property, and (2) where materials are lawfully separated, but no such intention is formed. With regards to the first of these he notes that while the tort of battery covers the wrong of non-consensual separation, it has nothing to say about the allocation of property rights in the removed tissue should a third party form the requisite intention post-removal.<sup>133</sup> He suggests,

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<sup>128</sup> Ibid 152.

<sup>129</sup> In Scotland they are governed by the Human Tissue Act (Scotland) 2006. The 2004 Act excludes hair and nails as well as gametes and embryos (which are within the remit of the Human Fertilisation & Embryology Act 1990, as amended 2008).

<sup>130</sup> Part 2, Schedule 1, Human Tissue Act 2004.

<sup>131</sup> S. 54(7).

<sup>132</sup> K Liddell, A Hall, 'Beyond Bristol and Alder Hey: The Future Regulation of Human Tissue' (2005) 13 *Med Law Rev* 170, 201.

<sup>133</sup> Hardcastle (n 2) 153.

drawing an analogy with the law relating to wild animals, that even though someone other than the source formed the intention, the source be allocated the property rights by default.<sup>134</sup> The principle being that a third party should not benefit from the unlawful removal of the tissue. Similarly, in cases where there is no initial intention by the source to create property but a third party does so, it is the source who should be recognised as the holder of the property rights because of their 'prior connection to [the materials]'.<sup>135</sup> Yet none of this shows that intention should play any role at all in the creation of property rights in human biomaterials; instead the relevant principle seems to be the prior connection of the source to their tissues.

Perhaps recognising this, Harris argues that property rights are created in separated biomaterials 'in virtue of creation-without-wrong'.<sup>136</sup> By this he means that there are specific circumstances where an individual ought to be considered as the owner of newly created resources where no wrong is done to third parties in doing so. In addition, he argues that this can only occur where trespassory rules are already in place which can protect the new creation; the creation does not require the imposition of 'novel trespassory obligations'.<sup>137</sup> In relation to separated biomaterials no novel trespassory rules are created because '[t]hose rules which previously protected the whole of his body crystallize around what is taken from it'.<sup>138</sup> The first thing to note is that if one rejects, as I have here, a distancing or separability criterion as doing any coherent normative work, it is unclear why the rules which 'crystallise' around separated biomaterials are rules of the non-proprietary kind prior to separation but become property-like afterwards. The prior connection to the person principle may be the justification, but if we reject separability and if intention is not doing useful normative work something else *must* be going on to explain why property rights in separated materials should vest in the source. A possible answer is that there are proprietary rights in separated materials where there is a prior proprietary justification. Harris gives the example of a painter to illustrate his creation-without-wrong thesis:

[A] painter who, for whatever reason, is regarded as justly owning his canvas and paints can, by virtue of the creation-without-wrong argument, claim to be the owner of the picture he paints.<sup>139</sup>

This example contains a key piece in the justification of the painter's ownership of the picture; he already *owns* the materials he used to create it. It is, therefore, strange that, with respect to the person and their body, Harris rejects the idea of self-ownership because in so doing he denies the prior ownership that *could* provide the justificatory underpinning for a property claim in separated materials.

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<sup>134</sup> Ibid 153-4. Here he cites *Blades v Higgs* (1865) 11 HLC 622 632 as support.

<sup>135</sup> Ibid 155.

<sup>136</sup> Ibid 204.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid 360.

<sup>139</sup> Ibid 204.



## 6. Conclusion

Despite the penetrance that the notion of separability has achieved in relation to the body and property in human tissue, I have demonstrated that even with modifications separability is weak and problematic. For those who would want to deny property in the body generally, but permit property in certain biomaterials, separability does not do the normative work required; contrariwise, it actually leads to the broad conclusion that much of the body is in fact *capable* of being considered as property. Even if we conjoin separability with another criterion such as *intention* or *creation-without-wrong*, we are still left with an allocation problem. Commentators such as Harris and Hardcastle argue that the source of separated biomaterials ought to be allocated property rights therein<sup>140</sup> and recent developments in case law have recognised such rights (at least in relation to sperm).<sup>141</sup> But where the source of the biomaterials is not considered the owner prior to their removal, we have no *prima facie* reason for thinking that any new property rights created upon separation should vest in them.

If my arguments in this article are correct, and a separability criterion does *not* give us sufficient grounds to draw a distinction between the whole intact body and its separated parts for proprietary purposes, two possible conclusions follow. First, if there are good reasons against recognising property in the whole body then these reasons may also extend to our separated biomaterials. A potential argument in this respect would be one from commodification; that recognising property rights is to wrongfully commodify the body.<sup>142</sup> However, such an approach would have implications not only for the source of those materials, but for third parties as well. This is because it is unclear why allocating property rights to the source of the tissue would be to wrongfully commodify whereas allocating them to third parties (researchers, biotech companies, etc.) would not be to do so.<sup>143</sup> A second alternative conclusion is this: it is correct that we

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<sup>140</sup> Harris (n 2) 360 and Hardcastle (n 2) 155. For a different view see L Skene, 'Proprietary Rights in Human Bodies, Body Parts, and Tissue' (2002) *Legal Studies* 102. Here Prof Skene argues *against* allocating property rights to the source of the biomaterials.

<sup>141</sup> *Yearworth* (n 9).

<sup>142</sup> See, for example, Justice Arabian's comments in the United States case *Moore v Regents of the University of California* 51 Cal.3d 120 (Cal, 1990), 148: 'Plaintiff has asked us to recognize and enforce a right to sell one's own body tissue for profit. He entreats us to regard the human vessel - the single most venerated and protected subject in any civilized society - as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane. He asks much.' Notwithstanding the fact that Justice Arabian's comments suggest that he misunderstood the nature of the claims before him (Moore was not asking that the Courts rule that he be allowed to sell his tissues on the open market, but that he be recognised as retaining such control that he could prevent others from doing so), this encapsulates the general tenor of appeals against commodification.

<sup>143</sup> For a nuanced discussion of commodification and some of the problems surrounding its use in arguments about the body see See Wilkinson, S., *Bodies for sale: Ethics and exploitation in the human body trade* (Routledge: London, 2003), 33-55. See also Wall (n 65) in a recent issue of this journal who suggests that it is an 'open question' whether we protect ownership entitlements in separated parts with property rules or liability rules

recognise property rights in the source over their separated materials, but the justification for doing so flows from the ownership that persons have over them *prior* to their separation. These rights inhere in persons over themselves, their bodies, and their parts regardless of whether they are detached and regardless of any intention to create property.<sup>144</sup> Nevertheless, for those who do not like such an approach and do not want to bite the self-ownership bullet the implication is clear; if they are to continue to hold that certain biomaterials *can* be property while also maintaining that other biomaterials and the whole intact body *cannot*, a justification more solid than separability needs to be found.

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(803). He argues that 'there is a necessary connection between property rules and the protection of income rights' which is not necessarily there for control rights (801) and this raises the spectre of commodification (799-800). If he is correct we still have to contend with the problem of why third parties are generally protected by property rules while the source of the biomaterials is not (the decision in *Yearworth* notwithstanding which was in essence a case about remedial action for a wrong which had already taken place).

<sup>144</sup> A mistaken objection to granting persons property in their own person, bodies, and parts would be to claim that it would lead to dire consequences such as slavery. Nothing in the suggestion that we grant this sort of proprietorial control to persons over themselves need lead to the conclusion that *others* may gain such control over them; contrariwise, we get closer to this type of worry where we grant property rights in biomaterials to third parties to the exclusion of the source.